INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	3
A. The Board's findings of fact	3
B. The Board's decision and order	6
C. The decision of the court of appeals	7
Reasons for granting the writ	8
Conclusion	13

CITATIONS

Cases:

Allied Chemical Workers v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157	8
Doude v. *Int'l Longshoremen's Ass'n*, 241 F. 2d 278	9
General Electric Co. v. *National Labor Relations Board*, 412 F. 2d 512	12
General Telephone Co. of the Southeast Case Nos. 5–CB–1279, *et al*	12
Lynchburg Foundry Co. v. *National Labor Relations Board*, 80 LRRM 2415, affirming, 192 NLRB No. 110	9
National Labor Relations Board v. *Borg-Warner Corp.*, 356 U.S. 342	8
National Labor Relations Board v. *General Electric Co.* 418 F. 2d 736, certiorari denied, 397 U.S. 965	12

474-688—72

Cases—Continued

	Page
National Labor Relations Board v. *Insurance Agents' Union*, 361 U.S. 477	11
National Labor Relations Board v. *Int'l Brotherhood of Electrical Workers*, 266 F. 2d 349, enforcing, 119 NLRB 1792	9
National Labor Relations Board v. *George P. Pilling Co.*, 119 F. 2d 32	9
National Labor Relations Board v. *South Atlantic & Gulf Coast Longshoremen's Ass'n*, 443 F. 2d 218	9
Shell Oil Co., 194 NLRB No. 166	12
Standard Oil Co., v. *National Labor Relations Board*, 322 F. 2d 40	9, 12
United Mine Workers v. *Pennington*, 381 U.S. 657	9
U.S. Pipe and Foundry Co. v. *National Labor Relations Board*, 298 F. 2d 873, certiorari denied, 370 U.S. 919	9
Statute:	
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):	
Section 8(b)(3)	2–3, 10
Section 8(d)	3
Section 9(a)	3
Miscellaneous:	
United Steelworkers of America, 15th Constitutional Convention (1970), p. 108	12
1971 Proceedings, Industrial Union Department, AFL–CIO, Ninth Constitutional Convention, p. 147	12

In the Supreme Court of the United States

OCTOBER TERM, 1972

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AFL–CIO JOINT NEGOTIATING COMMITTEE FOR PHELPS DODGE, ET AL., AND PHELPS DODGE CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case. A petition to review the same judgment has been filed by Phelps Dodge Corporation, No. 72–220, this Term.

OPINIONS BELOW

The opinion of the court of appeals (App., pp. A6–A14[1]) is reported at 459 F. 2d 374. The decision and order of the Board (App., pp. A14–A66) are reported at 184 NLRB No. 106.

---

[1] To avoid needless duplication, Appendix references are to the Appendix to the petition in No. 72–220, this Term.

JURISDICTION

The judgment of the court of appeals (App., pp. A4–A5) was entered on May 9, 1972, and an order modifying the opinion was entered on May 25, 1972 (App., pp. A66–A67). On July 31, 1972, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including September 6, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

In negotiations with a company that does not have company-wide collective bargaining, the unions insisted that final settlement of the contract covering the unit of the company's employees in which the bargaining was conducted be withheld, until agreement also was reached between the unions and the company in other units in which bargaining also was taking place. The avowed objective of the unions in the bargaining was to obtain similar contract terms for all units. The question presented is whether such conduct by the unions involved a demand for company-wide bargaining, contrary to the established units, and therefore constituted a refusal to bargain, in violation of Section 8(b)(3) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et. seq.*), are as follows:

> Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *

* * * * *

Sec. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

The facts are basically undisputed. Phelps Dodge Corporation ("the Company" or "Phelps Dodge"), whose principal office is in New York City (A. 277,

8),[2] operates four separate facilities in the State of Arizona ("the Western Operations"), which mine, concentrate and smelt ores. The Company also has a number of wholly-owned subsidiary corporations which, among other things, operate a copper refinery in El Paso, Texas (A. 443, 154–155), and manufacture wire, telephone cable, and related products at plants in Fordyce, Arkansas, and in Yonkers, New York (A. 443–444; 129, 133–134).[3]

The Company's employees have for many years been represented in different bargaining units by the 14 international unions involved in this proceeding (A. 447; 19–20, 298). Prior to 1967, bargaining at the Western Operations was often conducted with combinations of the various unions representing the employees there (A. 447; 20–21). The Company, however, never combined bargaining for its Western Operations with bargaining for any facilities of its subsidiaries (A. 21–22).

In March 1967, the Nonferrous Industry Conference ("NIC"), composed of representatives of the unions in that industry, promulgated "1967 Nonferrous Bargaining Policy Goals" which included obtaining company-wide master agreements and common contract termination dates throughout the industry. The NIC also established joint negotiating committees for each major copper company. In April 1967,

---

[2] "A." refers to the appendix to the briefs in the court below.

[3] Until August 22, 1967, Phelps Dodge Industries also owned the MacKenzie-Walton Company, which was engaged in the manufacture of copper and alloy tubes at Lincoln, Rhode Island (A. 444; 129–130).

the joint committee established to bargain with Phelps Dodge sent the Western Operations a number of proposals for modification of the then existing labor contracts (A. 450; 27–28, 341–345). These proposals, which expressly included the NIC bargaining goals, went beyond the Western Operations and contained demands to be applicable at the El Paso Refinery (A. 451; 342–345).

It is undisputed that, when the various company units refused to agree, the unions receded from their demand for a single master agreement covering all properties of the Company, and held separate negotiations with the established bargaining units. In the Western Operations negotiations, however, the unions demanded the right to have any provision negotiated in any agreement with other units of the Company incorporated into their agreement (the "most favored nation" clause) (A. 400, 453; 37–38), and a no-strike clause which would apply only when there was no lawful strike at any company unit (A. 452; 33–34, 399). The union negotiators at the other company units demanded settlements which were the same as the one to be negotiated for the Western Operations (A. 453; 158–159).[4] Thus, the unions sought to establish company-wide uniformity in the agreement terms.

---

[4] For instance, the union representative in the El Paso negotiations said that the union position in El Paso was the same as in Arizona and that El Paso issues would not be resolved in El Paso (A. 453; 159).

The parties were unable to resolve their differences (A. 454; 47–53). On July 15, the Company's Western Operations were struck (A. 454; 51–52), as were its MacKenzie-Walton facility (A. 454; 137) and El Paso refinery (A. 454; 52).

In negotiations during the strike, the unions dropped their insistence on the "most favored nation" and limited no-strike clauses, but demanded a company-wide "economic package," common contract termination dates, and simultaneous settlement of the contracts of all company units.[5] After the President intervened, agreement was reached on March 8, 1968, on the terms of the Western Operations contract. The unions nevertheless refused to sign it until it had been submitted to the NIC (A. 461; 164), which took no action, but directed the negotiators to continue bargaining to obtain uniform company-wide contract expiration dates (A. 461–462; 127–128, 178, 433–434). Finally, when agreements had been concluded with all other company units, NIC approved the Western Operations contract on March 16 (A. 463; 191).

B. THE BOARD'S DECISION AND ORDER

The Board (with one Member dissenting) found "that one of the [unions'] primary objectives through-

---

[5] A special panel, established by the Secretaries of Labor and Commerce to help resolve the strike, concluded that these were the unions' "basic ingredients which represent absolute preconditions for negotiations" (A. 460; 397–398). In testimony before this panel, a union representative affirmed that the unions were seeking company-wide bargaining (A. 459; 385-386).

out the course of bargaining at the [Company's] Arizona operations was to obtain agreement on terms and conditions of employment to be applicable generally on a companywide basis" (App., p. A15). The Board concluded that, "by insisting in furtherance of the aforesaid objective, as a condition of settlement of negotiations covering the [Company's] operations in its Western Division, on simultaneous and satisfactory settlement of contracts in other bargaining units and by striking in support of such demands," the unions sought to compel the Company to "engage in companywide bargaining, beyond the scope of established bargaining units," and thereby "violated Section 8(b)(3) of the Act" (App., pp. A17–A19).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals declined to enforce the Board's order. It read the Board's decision as being "based largely upon its belief that the unions began negotiations with the intention to secure company-wide master contracts and never abandoned that goal" (App., p. A11). The court concluded that the record did not support a finding that "the unions had never abandoned the objective of companywide contracts" (*ibid.*), since they had conducted separate negotiations at each of the company's units, without discussing the terms of employment at other units. Further, assuming without deciding (as the Board did) that the unions' demands for "most favored nation" and limited no-strike clauses, and for simultaneous settlement of all contracts were mandatory subjects of bargaining, the court held that the fact

that the unions insisted to impasse upon them "is not evidence of an attempt to merge the bargaining of separate units" (App., p. A13). "The fact that a demand may have extra-unit effects does not alter its status as a mandatory subject of bargaining" (*ibid.*).

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals undermines a cardinal principle on which the National Labor Relations Act is predicated, *i.e.*, that the established bargaining unit fixes the limits of the parties' mandatory bargaining obligation. The decision would permit labor organizations in major industries to resort to tactics like those utilized here to expand the scope of collective bargaining beyond established bargaining units and thereby unduly impede the negotiation and execution of collective agreements for those units, which, in turn, would be likely to foment further industrial strife. Review by this Court is thus warranted.

1. Although the employer and the union may voluntarily agree to merge separate bargaining units for purposes of contract negotiations,[*] such enlargement of the bargaining units is not a subject of mandatory bargaining under the Act. Cf. *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 164; *National Labor Relations Board* v. *Borg-Warner Corp.*, 356 U.S. 342. Therefore, neither party is free to insist, as a condition of reaching agreement in one

[*] As was done here with respect to the Western Operations (*supra*, p. 4).

unit, that the negotiations also include other units or that the terms negotiated in the first unit be extended to the other units.[7] See *Standard Oil Co.* v. *National Labor Relations Board*, 332 F. 2d 40, 45 (C.A. 6); *Doude* v. *Int'l Longshoremen's Ass'n*, 241 F. 2d 278 (C.A. 2); *National Labor Relations Board* v. *South Atlantic & Gulf Coast Longshoremen's Ass'n*, 443 F. 2d 218 (C.A. 5); *National Labor Relations Board* v. *Int'l Brotherhood of Electrical Workers*, 266 F. 2d 349 (C.A. 5), enforcing 119 NLRB 1972, 1795–1798. See also *United Mine Workers* v. *Pennington*, 381 U.S. 657, 666–667; *National Labor Relations Board* v. *George P. Pilling Co.*, 119 F. 2d 32, 38 (C.A. 3). Cf. *U.S. Pipe and Foundry Co.* v. *National Labor Relations Board*, 298 F. 2d 873, 877–878 (C.A. 5), certiorari denied, 370 U.S. 919. *Lynchburg Foundry Co.* v. *National Labor Relations Board* (C.A. 4), decided May 16, 1972, 80 LRRM 2415, affirming, 192 NLRB No. 110.

2. The basic issue in this case is whether the Board may properly determine that a union has sought to

[7] It is true "that a legitimate aim of any national labor organization is to obtain uniformity of labor standards," and that "a union may adopt a uniform wage policy and seek vigorously to implement it." *United Mine Workers* v. *Pennington*, 381 U.S. 657, 665, n. 2, 666. Thus, it would not violate the Act for a union to use a consummated contract in one unit as the pattern for contracts in other units. The Act is violated, however, where the union seeks to force the terms negotiated in one unit upon the other units, by withholding final settlement of a consummated contract in the first unit until the same basic terms have been extended to the other units. In the latter case, the bargain in the first unit is not merely a pattern, but it controls the bargaining in the other units just as effectively as if the units had been combined.

compel the employer to engage in bargaining beyond the scope of established bargaining units, in violation of Section 8(b)(3) of the Act, where, although it engages in separate negotiations for each unit, it refuses to execute an agreement in one unit until the same general terms are made available to the other units as well.

It is undisputed that this is what the unions did in this case. The court of appeals held that, without more, such actions do not constitute a violation of Section 8(b)(3) of the Act.

Although the court phrased its decision in terms of a lack of substantial evidence to support the Board's finding that the unions continued to seek a company-wide agreement, it in fact rejected the Board's legal conclusion that the undisputed facts showed a refusal to bargain by insisting that the terms negotiated in one unit be extended to the other units. The Board held that it was an unfair labor practice for a union to insist, as a condition of the settlement of negotiations in one bargaining unit, on simultaneous and satisfactory settlement of contracts in other bargaining units, in order to obtain company-wide uniformity on terms and conditions of employment. The court of appeals held that this, on the undisputed facts, was not an unfair labor practice, and that before an unfair labor practice could be made out the record would also have to show either bad faith bargaining by the union, or insistence to impasse on a non-mandatory demand. The evidence admittedly does not show the additional factors required by the court. In that sense only is the evidence not adequate to support the Board's decision.

The question meriting review by this Court is whether such factors are a necessary element of the unfair labor practice of insisting on bargaining beyond the scope of established bargaining units.

The disagreement between the Board and the court concerning whether the union goal of achieving company-wide master agreements was ever abandoned thus resolves itself into the question whether the translation of such goal into an effort to achieve company-wide uniformity by assuring the coincidence of the individual contracts negotiated for each unit constitutes an abandonment of the original goal. The court held that it does, given the assumption that none of the means by which this coincidence would be achieved constituted, in itself, a non-mandatory demand. The Board held that there was no abandonment, but merely the selection of an alternative means of achieving the same goal.

We submit that the Board correctly held that the unions could not insist to impasse on a course of conduct which in effect compelled the Company to bargain beyond established unit lines, a non-mandatory subject, even if the individual demands, in isolation, may constitute mandatory bargaining subjects. "Activities in isolation may be wholly innocent, lawful and 'protected' by the Act, but that ought not to bar the Board from finding, if the record justifies it, that the isolated parts 'are bound together as the parts of a single plan * * *. The plan may make the parts unlawful.'" *National Labor Relations Board* v. *Insurance Agents' Union*, 361 U.S. 477, 506 (separate opinion of

Frankfurter, J.). "[A] policy such as uniformity, innocent in and of itself, can in context become a vital part of an illegal overall pattern of conduct." *National Labor Relations Board* v. *General Electric Co.*, 418 F. 2d 736, 760, n. 15 (C.A. 2), certiorari denied, 397 U.S. 965.

3. The question whether unions, by the kind of tactics utilized here, may expand the scope of collective bargaining beyond established bargaining units is an important issue in the administration of the Act. Not only in the nonferrous industry, but in such other major industries as the electrical, the oil and chemical, and the telephone, there are many separate bargaining units and the companies have generally resisted the efforts of the unions representing those units to merge units and engage in company-wide bargaining.[8] The court below, in rejecting the Board's decision in this case, has shown the way for the unions to attempt to accomplish by indirection what they cannot achieve directly. Such an attempt in 1967–1968 resulted in an eight-month strike tying up the copper industry, which was terminated only after the intervention of the President. Similar disruptions of labor management relations are likely to be repeated[9] unless this

---

[8] See *Standard Oil Co., supra; Shell Oil Co.*, 194 NLRB No. 166, pending on petition to review, C.A.D.C., No. 72–1277; *General Electric Co.* v. *National Labor Relations Board*, 412 F. 2d 512, 514–515 (C.A. 2); *General Telephone Co. of the Southeast*, Case Nos. 5–CB–1279, *et al.*, complaint authorized.

[9] See Proceedings of the United Steelworkers of America, 15th Constitutional Convention (1970), p. 108; 1971 Proceedings Industrial Union Department, AFL–CIO, Ninth Constitutional Convention, p. 147.

Court grants review in this case and clarifies the responsibilities of both negotiating parties with respect to company-wide bargaining.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,
PATRICK HARDIN,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
LINDA SHER,
Attorney,
National Labor Relations Board.
AUGUST 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972